

Apr 05, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BARRY MCANDREWS,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No.1:17-CV-03075-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney D. James Tree represents Barry McAndrews (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on August 14, 2006, Tr. 264, alleging disability since October 15, 2001, Tr. 242, 245, due to asthma, attention deficit

1 hyperactivity disorder (ADHD), and sinus problems, Tr. 269. The applications
2 were denied initially and upon reconsideration. Tr. 159-62, 164-67.
3 Administrative Law Judge (ALJ) R.S. Chester held a hearing on March 27, 2009
4 and heard testimony from Plaintiff and vocational expert, Daniel McKinney. Tr.
5 50-71. The ALJ issued an unfavorable decision on April 14, 2009. Tr. 134-47.
6 The Appeals Council granted review and remanded the case back to the ALJ on
7 February 16, 2011. Tr. 153-56.

8 On July 21, 2011, ALJ Caroline Siderius held a new hearing and heard
9 testimony from Plaintiff, psychological expert, Margaret Moore, Ph.D., and
10 vocational expert, Daniel McKinney. Tr. 72-126. The ALJ issued an unfavorable
11 decision on August 25, 2011. Tr. 21-39. The Appeals Council denied review on
12 July 24, 2013. Tr. 1-3. On September 24, 2013, Plaintiff requested judicial review
13 of the ALJ's August 25, 2011 decision in the Eastern District of Washington. Tr.
14 1538-40. On October 9, 2014, this Court issued an order remanding the case to the
15 Commissioner for additional proceedings. Tr. 1545-61.

16 On December 17, 2015 and May 18, 2016, ALJ Virginia M. Robinson held
17 two additional hearings. Tr. 1427-99. The ALJ heard testimony from Plaintiff and
18 vocational expert, Kimberly Molinex. *Id.* She issued an unfavorable decision on
19 December 21, 2016. Tr. 1390-1415. The Appeals Council did not assume
20 jurisdiction of the case within the prescribed period set forth in 20 C.F.R. §
21 404.984, and the ALJ's December 21, 2016 decision became the final decision of
22 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
23 405(g). Plaintiff filed this action for judicial review on April 20, 2017. ECF No.
24 1.

25 **STATEMENT OF FACTS**

26 The facts of the case are set forth in the administrative hearing transcripts,
27 the ALJ's decision, and the briefs of the parties. They are only briefly summarized
28 here.

1 Plaintiff was 37 years old at the alleged date of onset. Tr. 242. His highest
2 level of education was the tenth grade, completed in 1982. Tr. 275. His work
3 history includes the jobs of baker, cook, and laborer. Tr. 270, 285. He alleged that
4 asthma, ADHD, depression, and sinus problems limited his ability to work. Tr.
5 269. Plaintiff reported that he stopped working on January 10, 2005 due to his
6 conditions. *Id.*

7 **STANDARD OF REVIEW**

8 The ALJ is responsible for determining credibility, resolving conflicts in
9 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
10 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
11 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
12 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
13 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
14 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
16 another way, substantial evidence is such relevant evidence as a reasonable mind
17 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
18 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
19 interpretation, the court may not substitute its judgment for that of the ALJ.
20 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
21 findings, or if conflicting evidence supports a finding of either disability or non-
22 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
23 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
24 evidence will be set aside if the proper legal standards were not applied in
25 weighing the evidence and making the decision. *Browner v. Secretary of Health*
26 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

27 **SEQUENTIAL EVALUATION PROCESS**

28 The Commissioner has established a five-step sequential evaluation process

1 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
2 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
3 through four, the burden of proof rests upon the claimant to establish a prima facie
4 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
5 burden is met once the claimant establishes that physical or mental impairments
6 prevent him from engaging in his previous occupations. 20 C.F.R. §§
7 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
8 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
9 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
10 which the claimant can perform exist in the national economy. *Batson v. Comm’r*
11 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
12 cannot make an adjustment to other work in the national economy, a finding of
13 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

14 ADMINISTRATIVE DECISION

15 On December 21, 2016, the ALJ issued a decision finding Plaintiff was not
16 disabled as defined in the Social Security Act.

17 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
18 activity since October 15, 2001, the alleged date of onset. Tr. 1393.

19 At step two, the ALJ determined Plaintiff had the following severe
20 impairments: asthma; ADHD; an affective disorder; an anxiety disorder; a
21 learning disorder; and a personality disorder. Tr. 1393.

22 At step three, the ALJ found Plaintiff did not have an impairment or
23 combination of impairments that met or medically equaled the severity of one of
24 the listed impairments. Tr. 1394.

25 At step four, the ALJ assessed Plaintiff’s residual function capacity and
26 determined he could perform work at a light exertional level with the following
27 limitations:
28

1 [T]he claimant can lift and/or carry 20 pounds occasionally and up to
2 10 pounds frequently. The claimant can stand or walk for
3 approximately 6 hours and sit for approximately 6 hours per 8-hour
4 workday with normal breaks. The claimant can no more than
5 occasionally climb ramps or stairs. He can never climb ladders, ropes
6 or scaffolds. The claimant can no more than frequently stoop, kneel,
7 crouch and crawl. The claimant must avoid concentrated exposure to
8 excessive vibration and to workplace hazards such as working with
9 dangerous machinery and working at unprotected heights. The
10 claimant must avoid exposure to pulmonary irritants such as fumes,
odors, dusts and gases. The claimant is further limited to simple routine
tasks with routine, simple, work-related decisions. The claimant can
have no more than occasional, superficial interaction with coworkers
and incidental interaction with the public.

11 Tr. 1396. The ALJ determined Plaintiff had no past relevant work. Tr. 1413.

12 At step five, the ALJ determined that, considering Plaintiff's age, education,
13 work experience and residual functional capacity, and based on the testimony of
14 the vocational expert, there were other jobs that exist in significant numbers in the
15 national economy Plaintiff could perform, including the jobs of assembler
16 production, cleaner housekeeping, and packing line worker. Tr. 1414. The ALJ
17 concluded Plaintiff was not under a disability within the meaning of the Social
18 Security Act at any time from October 15, 2001, through the date of the ALJ's
19 decision. Tr. 1415.

20 ISSUES

21 The question presented is whether substantial evidence supports the ALJ's
22 decision denying benefits and, if so, whether that decision is based on proper legal
23 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
24 medical opinions, (2) failing to make a proper step two determination, and (3)
25 failing to properly address Plaintiff's symptom statements.

26 DISCUSSION

27 1. Medical Opinions

28 Plaintiff argues the ALJ failed to properly consider and weigh the medical

1 opinions expressed by Fady F. Sabry, M.D., Gerardo Melgar, M.D., Philip
2 Johnson, Ph.D., Tae-Im Moon, Ph.D., Luci Carstens, Ph.D., Phillip Barnard, Ph.D.,
3 Amelia Rutter, ARNP, and Kathyn Jolin, PMHNP. ECF No. 14 at 5-17.

4 In weighing medical source opinions, the ALJ should distinguish between
5 three different types of physicians: (1) treating physicians, who actually treat the
6 claimant; (2) examining physicians, who examine but do not treat the claimant;
7 and, (3) nonexamining physicians who neither treat nor examine the claimant.
8 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
9 weight to the opinion of a treating physician than to the opinion of an examining
10 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
11 should give more weight to the opinion of an examining physician than to the
12 opinion of a nonexamining physician. *Id.*

13 When a treating physician's opinion is not contradicted by another
14 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
15 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
16 physician's opinion is contradicted by another physician, the ALJ is only required
17 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
18 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
19 physician's opinion is not contradicted by another physician, the ALJ may reject
20 the opinion only for "clear and convincing" reasons, and when an examining
21 physician's opinion is contradicted by another physician, the ALJ is only required
22 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d
23 at 830-31.

24 The specific and legitimate standard can be met by the ALJ setting out a
25 detailed and thorough summary of the facts and conflicting clinical evidence,
26 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
27 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
28 conclusions, she "must set forth [her] interpretations and explain why they, rather

1 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
2 1988).

3 **A. Fady F. Sabry, M.D.**

4 On August 11, 2009, Dr. Sabry completed a Physical Evaluation form for
5 the Washington State Department of Social and Health Services (DSHS). Tr.
6 1313-16. He found Plaintiff's asthma resulted in mild to moderate limitation in
7 Plaintiff's ability to sit, stand, walk, lift, handle, and carry and Plaintiff's anxiety
8 resulted in mild limitations in the same six functions. Tr. 1315. He then limited
9 Plaintiff to sedentary work. *Id.* He found that Plaintiff was able to participate in
10 pre-employment activities such as job searches or employment classes, stating that
11 Plaintiff needed medicine for asthma control and if he got the asthma under control
12 the limitations would be none to mild instead of mild to moderate. Tr. 1316. Dr.
13 Sabry completed a second Physical Evaluation form for DSHS on June 18, 2010.
14 Tr. 1328-31. Dr. Sabry diagnosed Plaintiff with asthma and hypertension and
15 opined that they resulted in mild limitations in Plaintiff's ability to sit, stand, walk,
16 lift, handle, and carry. Tr. 1330. He again limited Plaintiff to sedentary work. *Id.*
17 He opined that without treatment Plaintiff's conditions would continue for at least
18 twelve months. Tr. 1331. Again, he stated that Plaintiff needed medications. *Id.*

19 The ALJ gave these opinions some weight, accepting the mild to moderate
20 limitations due to asthma and anxiety by finding that they were supported by the
21 overall record, but rejecting Dr. Sabry's ultimate conclusion that Plaintiff was
22 limited to sedentary work. Tr. 1407. The ALJ stated that she "does not find
23 sufficient objective medical evidence to support [Dr. Sabry's] finding the claimant
24 is limited to sedentary work." *Id.*

25 This assertion by the ALJ for rejecting the limitation to sedentary work
26 opinion of Dr. Sabry is insufficient. "[A]n ALJ errs when [she] rejects a medical
27 opinion or assigns it little weight while doing nothing more than ignoring it,
28 asserting without explanation that another medical opinion is more persuasive, or

1 criticizing it with boilerplate language that fails to offer a substantive basis for
2 [her] conclusion.” *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014)
3 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)). Here, the Court
4 agrees with Plaintiff that the ALJ failed to properly evaluate this treating doctor’s
5 opinions by failing to provide sufficient explanation to support her findings

6 Plaintiff asserts that the Court should apply the credit-as-true rule to Dr.
7 Sabry’s opinions and remand this case for an immediate award of benefits at least
8 as of Plaintiff’s fiftieth birthday, proposing that the Court apply grid rule 201.09.
9 ECF No. 14 at 8. The Ninth Circuit has developed a framework for applying the
10 credit-as-true rule:

11 (1) the record has been fully developed and further administrative
12 proceedings would serve no useful purpose; (2) the ALJ has failed to
13 provide legally sufficient reasons for rejecting evidence, whether
14 claimant testimony or medical opinion; and (3) if the improperly
15 discredited evidence were credited as true, the ALJ would be required
to find the claimant disabled on remand.

16 *Garrison*, 759 at 1020. All three parts of the framework must be satisfied in order
17 for the Court to remand a case with instructions to calculate and award benefits.
18 *Id.*

19 Here, as addressed above, the second part of the Ninth Circuit’s framework
20 has been met: the ALJ as failed to provide legally sufficient reasons for rejecting
21 the Dr. Sabry’s opinions. However, considering the first and third components
22 brings to light two issues: (1) Plaintiff’s residual functional capacity as of his
23 fiftieth birthdate and (2) the materiality of Plaintiff’s substance abuse.

24 First, Dr. Sabry’s most recent opinion is from June 18, 2010. Tr. 1331.
25 Plaintiff attained the age of fifty in July of 2014. Tr. 242. Therefore, four years
26 elapsed between the opinion and Plaintiff reaching the approaching advanced age
27 category applicable in grid rule 201.09. During this time, Plaintiff sought
28 treatment and received medication for his asthma. See Tr. 2729, 2731, 2735, 2740-

41, 2745, 2749-50, 2754, 2759, 2763, 2768, 2776, 2823, 2828, 2833-34, 2838, 2843, 2848-49. In the month that Plaintiff turned fifty, his medications included Flonase, Advair, Atrovent, Claritin, and Albuterol. Tr. 2823. According to Dr. Sabry's opinions, Plaintiff's limitation to sedentary work was expected to last at least twelve months without treatment, and Dr. Sabry indicated Plaintiff would experience improvement with medication. Tr. 1316, 1331. Therefore, even crediting Dr. Sabry's June 18, 2010 opinion as true, does not necessarily mean Plaintiff was limited to sedentary work around July of 2014. As such, it is necessary to remand the case so that Dr. Sabry's opinions can be properly addressed, and if it is determined that Plaintiff was limited to sedentary work in 2010, the ALJ will need to determine if that limitation continue through Plaintiff's fiftieth birthday.

Second, even if the record was fully developed and substantial evidence supported a finding that Plaintiff was disabled as of his fiftieth birthday, it must be determined whether his substance abuse was a contributing factor material to the determination of disability. *See* 20 C.F.R. §§ 404.1535, 416.935; S.S.R. 13-2p. Arguably, Dr. Sabry addressed this issue in his opinions, both of which found that of the impairments addressed on the forms none were caused or aggravated by alcohol or drug use. Tr. 1316, 1331. Additionally, the ALJ found that Plaintiff appeared to have attained and maintained sobriety from November of 2013 through the date of the most recent ALJ decision, Tr. 1404, despite evidence Plaintiff tested positive for cannabis in October of 2014, Tr. 2024. However, since the case is to be remanded to address Dr. Sabry's opinions, this is to be addressed in full upon remand, if necessary.

B. Gerardo Melgar, M.D.

On June 14, 2005, Dr. Melgar completed a physical evaluation form for DSHS. Tr. 581- 83. He diagnosed Plaintiff with asthma and opined that it resulted in a moderate to marked limitation on his ability to walk, lift, and carry. Tr. 582.

1 He limited Plaintiff to sedentary work with no exposure to extreme temperatures
2 and dust, no heavy lifting, and no prolonged walking. *Id.* Dr. Melgar opined that
3 Plaintiff's limitations would continue without medical treatment for at least twelve
4 months, but with treatment his ability to work should be re-evaluated in twelve
5 months. Tr. 583. The ALJ gave the opinion little weight for two reasons: (1) there
6 is little evidence in the medical records indicating Plaintiff's asthma has resulted in
7 any exertional limitations, and (2) Plaintiff has maintained a full complement of
8 daily activities despite the asthma. Tr. 1406. The parties agree the ALJ was
9 required to provide specific and legitimate reasons for rejecting Dr. Melgar's
10 opinion. ECF Nos. 15 at 3; 16 at 2.

11 The ALJ's first reason, that that there is little evidence of Plaintiff's asthma
12 resulting in functional limitations, meets the specific and legitimate standard.
13 Inconsistency with the majority of objective evidence is a specific and legitimate
14 reason for rejecting a physician's opinions. *Batson*, 359 F.3d at 1195. While the
15 ALJ failed to cite any medical evidence following this statement, Tr. 1406, earlier
16 in her opinion, she summarized the medical evidence surrounding Plaintiff's
17 asthma including the FEV1 scores throughout the file, Tr. 1399-1400. As asserted
18 by the ALJ, this evidence demonstrates that Plaintiff's asthma symptoms improved
19 with treatment, such as a bronchodilator and the use of his inhalers. *Id.*

20 Plaintiff argues that there is evidence that his asthma prevented him from
21 attending group therapy sixteen times. ECF No. 14 at 8-9. However, the records
22 Plaintiff cites demonstrates that he was excused from group because he reported
23 feeling ill or was attending doctor appointments; these were not clear statements of
24 observed asthma attacks preventing attendance. Tr. 2300, 2302-03, 2305-07,
25 2309-10, 2390, 2392, 2406, 2419, 2422, 2430, 2432. There is evidence that on
26 January 23, 2014, Plaintiff missed group therapy because he was in the hospital for
27 dyspnea and ear pain. Tr. 2397, 3110. Plaintiff reported to ambulance staff that he
28 was in treatment and unable to get his medications, Tr. 3109, and at the hospital his

1 breathing improved with a breathing treatment. Tr. 3112. This supports the ALJ's
2 assertion that Plaintiff's breathing impairments improve with treatment and are
3 remedied with medication. In fact, the only asthma related exertional limitations
4 demonstrated in these records, is Plaintiff's complaint that the asthma medication
5 causes drowsiness. Tr. 2384. Since the ALJ's conclusions are supported by
6 substantial evidence, her reason meets the specific and legitimate standard.

7 Plaintiff is accurate that the ALJ was inconsistent in finding asthma severe at
8 step two, i.e. that it more than minimally limits plaintiff's ability to work, Tr. 1393,
9 then later in the residual functional capacity discussion, the ALJ found that "there
10 is no evidence in the medical record indicating the claimant's asthma has resulted
11 in any exertional limitations," Tr. 1399, and then when discussing Dr. Melgar's
12 opinion she found that "there is little evidence in the medical records indicating the
13 claimant's asthma has resulted in any exertional limitations." Tr. 1406. However,
14 any error resulting from these inconsistent findings are essentially harmless
15 because S.S.R. 96-8p requires the ALJ's residual functional capacity determination
16 to consider all of Plaintiff's impairments, both severe and non-severe. Therefore,
17 no matter where asthma falls on the severity spectrum, it is to be considered. Here,
18 the ALJ has clearly addressed asthma throughout the residual functional capacity
19 discussion and included limitations representing her findings in the final residual
20 functional capacity determination. *See* Tr. 1396 (limiting Plaintiff's ability to
21 climb ramps or stairs and limiting Plaintiff's exposure to pulmonary irritants); *See*
22 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless
23 when "it is clear from the record that the . . . error was inconsequential to the
24 ultimate nondisability determination.")). However, the case is being remanded for
25 the ALJ to further address Dr. Sabry's opinion, and the ALJ can correct these
26 inconsistent findings upon remand.

27 The ALJ's second reason for rejecting the opinion, that it is inconsistent with
28 Plaintiff's reported activities, is sufficient to meet the specific and legitimate

1 standard. A claimant's daily activities may be seen as inconsistent with the
2 presence of a disabling condition. *See Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th
3 Cir. 1990). When applying for benefits, Plaintiff reported that one of his primary
4 sources of transportation was walking. Tr. 280. In May and June of 2010, Plaintiff
5 was treated for two separate falls from his bicycle. Tr. 1181, 3020. Again in
6 August of 2012, Plaintiff was treated for a fall from his bicycle. Tr. 2995. In April
7 of 2014, Plaintiff again reported walking as one of his modes of transportation. Tr.
8 1900. This is substantial evidence that supports the ALJ's assertion that Plaintiff's
9 activities were inconsistent with the limitations set forth in Dr. Melgar's opinion.

10 Plaintiff asserts that these periods of activity represent the waxing and
11 waning of his asthma flares. ECF No. 14 at 7. Plaintiff cites to a treatment record
12 dated June 27, 2006 in which he was diagnosed with exacerbation of his asthma.
13 *Id. citing* Tr. 593. However, the treatment record shows that Plaintiff told the
14 provider that he had failed to follow up with his appointment with Dr. Hill and had
15 run out of all his asthma medications, including Singular, Flonase, Claritin, Advair,
16 Atrovent, and albuterol. Tr. 593. Therefore, this is consistent with the ALJ's
17 findings that Plaintiff's symptoms are controlled with medication. Waxing and
18 waning of symptoms are not uncommon when discussing chronic conditions. *See*
19 *Garrison*, 759 F.3d at 1017. However, the Court refuses to equate a failure to
20 follow prescribed treatment as a waxing of symptoms. Therefore, the ALJ's
21 rationale was supported by substantial evidence and his rejection of the opinion
22 was legally sufficient. However, this case is being remanded for the ALJ to
23 properly address Dr. Sabry's opinions regarding Plaintiff's asthma. Therefore,
24 upon remand the ALJ may choose to readdress Dr. Melgar's opinion if warranted
25 by his reconsidering of Dr. Sabry's opinions.

26 **C. Philip Johnson, Ph.D.**

27 On October 16, 2006, Dr. Johnson completed a psychological evaluation.
28 Tr. 723-28. He diagnosed Plaintiff with alcohol dependence in early remission,

1 cannabis dependence in early remission, amphetamine dependence in sustained full
2 remission, major depressive disorder, recurrent, in partial remission, ADHD, and
3 borderline intellectual functioning. Tr. 727. In Dr. Johnson's medical source
4 statement, he opined that Plaintiff's abilities to understand, reason, and remember
5 falls in the borderline range of intellectual functioning, his ability to sustain
6 concentration, persistence, and paces is adequate when sober with some limitations
7 from ADHD, his ability to interact socially was adequate, and his ability to cope
8 with stress had some limitations. Tr. 728. The ALJ gave this opinion significant
9 weight finding it was supported by Dr. Johnson's narrative report. Tr. 1408.

10 The Court is remanding this case for a reconsideration of Dr. Sabry's
11 opinion, which addressed Plaintiff's anxiety, *see supra*, and the psychological
12 opinions of Dr. Moon and Dr. Barnard, *see infra*. Therefore, the ALJ is instructed
13 to readdress Dr. Johnson's opinion upon remand.

14 **D. Tae-Im Moon, Ph.D.**

15 On July 12, 2012, Dr. Moon completed a Psychological/Psychiatric
16 Evaluation form for DSHS. Tr. 2069-73. He diagnosed Plaintiff with major
17 depressive disorder, anxiety disorder, ADHD, alcohol dependence in sustained
18 remission, cannabis dependence, and personality disorder. Tr. 2070. He opined
19 that Plaintiff had a marked limitation in eight and a moderate limitation in an
20 additional two of the thirteen areas of functioning provided on the form. Tr. 2071.
21 He opined that none of the impairments were primarily the result of alcohol or
22 drug use. Tr. 2072. He opined that the above limitations would persist for twelve
23 to twenty-four months with available treatment. *Id.*

24 The ALJ gave this opinion "limited weight" for four reasons: (1) it was
25 based on Plaintiff's self-reports; (2) Plaintiff was required to cooperate with the
26 recommendations of DSHS to keep his cash assistance; (3) it was inconsistent with
27 the mental status examination performed by Dr. Moon; and (4) it was inconsistent
28 with the medical evidence of record. Tr. 1409. Both parties appear to agree the

1 ALJ was required to provide specific and legitimate reasons for rejecting Dr.
2 Moon's opinion. ECF Nos. 15 at 10; 16 at 7-8.

3 The ALJ's reason for rejecting Dr. Moon's opinion fails to meet the specific
4 and legitimate standard. First, a doctor's opinion may be discounted if it relies on
5 a claimant's unreliable self-report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th
6 Cir. 2005); *Tommasetti*, 533 F.3d at 1041. However, the ALJ must provide a basis
7 for her conclusion that the opinion was based more heavily on a claimant's self-
8 reports and not on clinical evidence. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th
9 Cir. 2014). Here, the ALJ failed to provide such a basis, stating only that "Dr.
10 Moon's assessment is based on unreliable self-reports and conflicts as noted
11 above." Tr. 1409. The reference to conflicts noted previously in the decision is
12 unclear as this was the first mention of Dr. Moon's evaluation. *Id.* Therefore, this
13 first reason is not legally sufficient to support the ALJ's treatment of Dr. Moon's
14 opinion.

15 Second, the ALJ's mention of Plaintiff's requirement to attend treatment to
16 retain his eligibility for benefits under DSHS is neither specific nor legitimate. It is
17 unclear how Plaintiff following prescribed treatment would make Dr. Moon's
18 evaluation less persuasive. The reason hints at an accusation of motivation for
19 secondary gain, but this would attack Plaintiff's credibility, not Dr. Moon's
20 reliability. Furthermore, the purpose for which medical reports are prepared does
21 not provide a legitimate basis for rejecting them. *Lester*, 81 F.3d at 832.
22 Therefore, this second reason is also legally insufficient.

23 Third, the ALJ found that Dr. Moon's opinion was inconsistent with the
24 mental status examination he completed as part of his evaluation. Tr. 1409. The
25 ALJ's conclusion that the mental status examination was normal except for
26 difficulties with abstract thought is not supported by substantial evidence. On the
27 mental status exam form, Dr. Moon found Plaintiff's appearance to be unkempt,
28 his mood to be anxious/fearful, his affect to be anxious, *and* his abstract thought

1 process to be abnormal. Tr. 2072-73. Therefore, this reason is not sufficient to
2 support the ALJ's ultimate determination to limit the weight provided to Dr.
3 Moon's opinion.

4 The ALJ's fourth reason, that Dr. Moon's opinion was inconsistent with the
5 medical evidence, does not meet the necessary legal standard. Inconsistency with
6 the majority of objective evidence is a specific and legitimate reason for rejecting
7 physician's opinions. *Batson*, 359 F.3d at 1195. The ALJ specifically found that
8 Plaintiff's medical records showed he engaged in "robust activities of daily living,"
9 including attending AA meetings, bible study, and a local church, he responded
10 well to mental health medications, he failed to comply with follow-up treatment
11 and medication, he experienced symptom relief with medication usage, and there
12 were no reports of inattention or difficulty concentrating after he became sober.
13 Tr. 1409. The ALJ concluded that these findings were inconsistent with the
14 limitations opined by Dr. Moon. *Id.* However, the ALJ failed to state what portion
15 of Dr. Moon's opinion was discounted by these records. This fails short of the
16 specificity required under *Embrey*, 849 F.2d at 421-22. Upon remand, the ALJ will
17 readdress Dr. Moon's opinion.

18 **E. Phillip Barnard, Ph.D.**

19 On July 25, 2013, Dr. Barnard completed a Psychological/Psychiatric
20 Evaluation form for DSHS after examining Plaintiff. Tr. 2874-77. He diagnosed
21 Plaintiff with ADHD/Combined type, learning disorder not otherwise specified,
22 alcohol dependence in sustained full remission, and bipolar disorder not otherwise
23 specified. Tr. 2875. He opined that Plaintiff had a severe limitation in four areas
24 of mental functioning, a marked limitation in four areas of mental functioning, and
25 a moderate limitation in the remaining five areas of mental functioning addressed
26 on the form. Tr. 2876. He found that that current impairments were not the
27 primary result of drug or alcohol use in the past sixty days. *Id.* He further opined
28 that Plaintiff's impairments would continue for twenty-four to forty-eight months

1 with available treatment. *Id.*

2 The ALJ gave the opinion “little weight” for three reasons: (1) the mental
3 status examination was inconsistent with the mental status examination from Dr.
4 Moon; (2) the opinion was prepared for the purposes of a state disability
5 determination and not a federal disability determination; and (3) it was inconsistent
6 with the rest of the medical evidence. All three of these reasons fail to meet the
7 lesser standard of specific and legitimate.

8 The ALJ’s first reason fails to meet the specific and legitimate standard.
9 The ALJ stated that “[u]nlike with Dr. Moon, the claimant’s mental status
10 examination appears largely outside of normal limits in thought process, memory,
11 concentration and insight and judgment, which raises questions, as to the
12 claimant’s consistence of performance.” Tr. 1411. This statement is based on the
13 ALJ’s previous determination that Dr. Moon’s mental status examination
14 contained normal results. However, as addressed above, the conclusion that Dr.
15 Moon’s mental status examination showed normal results was not supported by
16 substantial evidence. However, if the two mental status exams are compared, it is
17 noted that Plaintiff performed differently on the tests, but also that the areas
18 Plaintiff struggled in on Dr. Barnard’s exam were not actually tested on Dr.
19 Moon’s exam: On Dr. Moon’s exam, serials seven were not performed and
20 Plaintiff’s serial three contained an error, he could recall three out of three objects
21 immediately, but there is no indication he was asked again after the three minute
22 delay; he could spell word forward but not backwards, and he could recall six
23 digits forward, but there is no indication he was tested on digits backwards. Tr.
24 2073. On Dr. Barnard’s exam, Plaintiff could not accomplish either serial sevens
25 or threes, he was able to recall one out of five objects after a five minute delay, he
26 could spell word forward but not backwards, and he was able to reproduce only
27 four digits forward and three backwards. Tr. 2877. Additionally, Dr. Barnard
28 tested Plaintiff’s insight and judgement and Dr. Moon did not. Tr. 2073, 2877.

1 Considering the previous determination that the ALJ's findings regarding Dr.
2 Moon's mental status examination were not supported by substantial evidence and
3 the fact that Dr. Moon's examination did not contain the same testing as Dr.
4 Barnard's examination, the Court refuses to find these two exams as comparable to
5 support the ALJ's assertion that Plaintiff's performance was inconsistent.
6 Therefore, this reason fails to meet the specific and legitimate standard.

7 The ALJ's second reason, that the opinion was prepared for a state disability
8 determination and not a federal disability determination, does not meet the specific
9 and legitimate standard. The regulations require every medical opinion to be
10 evaluated, regardless of its source. 20 C.F.R. §§ 404.1527(c), 416.927(c).
11 Furthermore, the purpose for which medical reports are prepared does not provide
12 a legitimate basis for rejecting them. *Lester*, 81 F.3d at 832. Although this opinion
13 was prepared for the purpose of evaluating eligibility for DSHS benefits, the
14 medical opinion contained in the report must be considered by the ALJ. Thus, this
15 reason for rejecting Dr. Barnard's opinion is improper.

16 The ALJ's third reason for rejecting Dr. Barnard's opinion was identical to
17 her final reason for rejecting Dr. Moon's opinion. Tr. 1411. As discussed above,
18 without stating how this evidence was inconsistent with the opinion, the reason
19 falls short of the specific and legitimate standard in *Embrey*. Therefore, upon
20 remand, the ALJ will also readdress Dr. Barnard's opinion.

21 **F. Luci Carstens, Ph.D.**

22 On August 12, 2013, Dr. Carstens completed a Review of Medical Evidence
23 form for DSHS indicating that she had reviewed Dr. Barnard's July 25, 2013
24 report. Tr. 2850. Her opinion regarding Plaintiff's functional abilities mirrored
25 that of Dr. Barnard. Tr. 2851.

26 The ALJ gave the opinion little weight for the same reasons he rejected Dr.
27 Barnard's opinion. *See supra*. Based on the legal analysis presented above, the
28 ALJ will also readdress Dr. Carsten's opinion on remand.

1 **F. Amelia Rutter, ARNP**

2 Ms. Rutter completed a medical source statement form in July of 2015 in
3 which she opined that Plaintiff would miss an average of four or more work days a
4 month if employed at a forty hour work week. Tr. 1932-34. The ALJ gave the
5 opinion little weight for four reasons: (1) Ms. Rutter is not an acceptable medical
6 source, (2) the period of her assessment includes when Plaintiff was using
7 substances and when he was sober, (3) the opinion does not explain why Plaintiff
8 would miss work, and (4) it was inconsistent with the evidence in the record. Tr.
9 1412.

10 Ms. Rutter is a nurse practitioner, which for cases filed before March 27,
11 2017, is not considered an acceptable medical source. *See* 20 C.F.R. §§
12 404.1502(a)(7), 416.902(a)(7). An ALJ is required, however, to consider evidence
13 from “other sources,” 20 C.F.R. §§ 404.1527(f), 416.927(f), “as to how an
14 impairment affects a claimant’s ability to work,” *Sprague*, 812 F.2d at 1232. An
15 ALJ must give “germane” reasons to discount evidence from “other sources.”
16 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

17 The ALJ’s first reason, that Ms. Rutter is not an acceptable medical source,
18 speaks to what standard applies to her opinion, and does not meet the germane
19 standard on its own. The three remaining reasons were specific to the opinion and
20 supported by substantial evidence. Ms. Rutter opined the limitations were present
21 in June of 2013, which was prior to Plaintiff’s reported sobriety in November of
22 2013, and was valid at the time the opinion was rendered in July of 2015. Tr.
23 1439, 1934. Therefore, the opinion covered both periods of Plaintiff’s use and
24 sobriety. The opinion did not provide an explanation as to why Plaintiff would
25 miss work at the rate opined despite the form providing a space for such an
26 explanation. Tr. 1933. The final reason, that the opinion was inconsistent with the
27 medical evidence that Plaintiff’s inattention and concentration difficulties did not
28 continue past sobriety, also meets the germane standard as records show that

1 Plaintiff did not complain of these limitations following sobriety. *See* Tr. 3207,
2 3212. Therefore, the ALJ has provided some reasons that meet the necessary
3 standard.

4 This case is being remanded for the ALJ to readdress Dr. Sabry's opinion
5 regarding Plaintiff's physical limitations. Therefore, upon remand the ALJ will
6 also readdress her treatment of this opinion if warranted by the reweighing of the
7 other evidence in the file.

8 **G. Kathryn Jolin, PMHNP**

9 In July of 2015, Ms. Jolin completed a mental source statement in which she
10 opined that Plaintiff had a marked limitation in the ability to maintain attention and
11 concentration for extended periods and a moderate limitation in twelve additional
12 areas of mental functioning. Tr. 1935-37. Additionally, she opined that Plaintiff
13 would be off task over 30% of the time and would miss four or more days a month
14 if employed forty hours a week. Tr. 1937. The ALJ gave the opinion "little
15 weight" for two reasons: (1) Ms. Jolin was not an acceptable medical source and
16 (2) the opinion was inconsistent with the medical records showing activities of
17 daily living, a good response to mental health medications, a failure to comply with
18 treatment, and symptom relief with medication. Tr. 1412.

19 As addressed above, the ALJ's first reason speaks to the standard to apply to
20 the ALJ's rationale for dismissing the opinion, and is not a standalone reason to
21 reject the opinion. However, the ALJ's second reason, that the opinion is
22 inconsistent with the medical records is sufficient to meet the germane standard.

23 This case is being remanded for the ALJ to readdress multiple opinions from
24 acceptable medical sources regarding Plaintiff's mental residual functional
25 limitations. Therefore, the ALJ will readdress this opinion on remand.

26 **2. Step Two**

27 Plaintiff asserts that the ALJ erred at step two by failing to consider his
28 hypertension and spinal impairments. ECF No. 14 at 17-18.

1 The step-two analysis is “a de minimis screening device used to dispose of
2 groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
3 impairment is “not severe” if it does not “significantly limit” the ability to conduct
4 “basic work activities.” 20 C.F.R. §§ 404.1522(a), 416.922(a). Basic work
5 activities are “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§
6 404.1522(b), 416.922(b). “An impairment or combination of impairments can be
7 found not severe only if the evidence establishes a slight abnormality that has no
8 more than a minimal effect on an individual’s ability to work.” *Smolen v. Chater*,
9 80 F.3d 1273, 1290 (9th Cir. 1996) (internal quotation marks omitted).

10 The ALJ’s decision is silent as to Plaintiff’s hypertension and spinal
11 impairment. However, Plaintiff failed to allege what limitations stem from these
12 impairments. ECF No. 14 at 17-18. In *Burch v. Barnhart*, Ninth Circuit explained
13 that a failure to consider an impairment severe at step two can only harm a
14 claimant at steps three and steps five when step two is resolved in his favor. 400
15 F.3d 676, 682 (9th Cir. 2005). In that case, the Circuit refused to find any
16 reversible error at steps three and five because the claimant failed to offer any
17 theory, plausible or otherwise, as to how these impairments resulted in the claimant
18 equaling a listing or resulting in any limitations. *Id.* at 682-83. Here, Plaintiff also
19 failed to allege any functional limitations resulting from these impairments.

20 **3. Plaintiff’s Symptom Statements**

21 Plaintiff contests the ALJ’s determination that his symptom statements were
22 not consistent with the record. ECF No. 14 at 18-22.

23 It is generally the province of the ALJ to make determinations regarding the
24 credibility of Plaintiff’s symptom statements, *Andrews*, 53 F.3d at 1039, but the
25 ALJ’s findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
26 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
27 the ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear
28 and convincing.” *Smolen*, 80 F.3d at 1281; *Lester*, 81 F.3d at 834. “General

1 findings are insufficient: rather the ALJ must identify what testimony is not
2 credible and what evidence undermines the claimant's complaints." *Lester*, 81
3 F.3d at 834.

4 The ALJ found that Plaintiff's testimony regarding the intensity, persistence,
5 and limiting effects of his symptoms as "not entirely consistent with the medical
6 evidence and other evidence in the record." Tr. 1398. The ALJ found that the
7 medical record did not support Plaintiff's statements concerning the frequency of
8 his acute asthma attack, the frequency he needed his rescue inhaler, his last use of
9 amphetamines, his ability to participate in activities, the frequency he left his
10 home, and the frequency he attended treatment. Tr. 1398-1400. Additionally, the
11 ALJ found that Plaintiff failed to follow prescribed treatment. Tr. 1399.

12 The evaluation of a claimant's symptom statements and their resulting
13 limitations relies, in part, on the assessment of the medical evidence. *See* 20
14 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case
15 being remanded for the ALJ to address the medical source opinions in the file, a
16 new assessment of Plaintiff's subjective symptom statements is necessary.

17 **REMEDY**

18 The decision whether to remand for further proceedings or reverse and
19 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
20 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
21 where "no useful purpose would be served by further administrative proceedings,
22 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
23 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
24 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
25 (9th Cir. 1990). *See also Garrison*, 759 F.3d at 1021 (noting that a district court
26 may abuse its discretion not to remand for benefits when all of these conditions are
27 met). This policy is based on the "need to expedite disability claims." *Varney*,
28 859 F.2d at 1401. But where there are outstanding issues that must be resolved

1 before a determination can be made, and it is not clear from the record that the ALJ
2 would be required to find a claimant disabled if all the evidence were properly
3 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96
4 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

5 In this case, it is not clear from the record that the ALJ would be required to
6 find Plaintiff disabled if all the evidence were properly evaluated. Further
7 proceedings are necessary for the ALJ properly address the medical opinions in the
8 file, make a new step two determination, and a new symptom statement
9 determination. Furthermore, the ALJ will supplement the record with any
10 outstanding evidence and hold a supplemental hearing if necessary.

11 CONCLUSION

12 Accordingly, **IT IS ORDERED:**

13 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
14 **DENIED**.

15 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
16 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
17 additional proceedings consistent with this Order.

18 3. Application for attorney fees may be filed by separate motion.

19 The District Court Executive is directed to file this Order and provide a copy
20 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
21 **and the file shall be CLOSED.**

22 DATED April 5, 2018.



A handwritten signature in black ink, appearing to read "M", is positioned above the printed name of the judge.

23
24 JOHN T. RODGERS
25 UNITED STATES MAGISTRATE JUDGE
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